

立法會
Legislative Council

LC Paper No. CB(1)2562/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/2/11/2

**Bills Committee on
Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012**

**Minutes of the sixth meeting
held on Monday, 21 May 2012, at 2:30 pm
in Conference Room 2A of the Legislative Council Complex**

- Members present** : Hon Fred LI Wah-ming, SBS, JP (Chairman)
Hon James TO Kun-sun
Hon WONG Kwok-hing, MH
Hon WONG Ting-kwong, BBS, JP
Hon Starry LEE Wai-king, JP
Dr Hon LEUNG Ka-lau
Hon Paul TSE Wai-chun, JP
Hon Tanya CHAN
- Member absent** : Hon Vincent FANG Kang, SBS, JP
- Public officers attending** : Agenda Item I
Mrs Alice CHEUNG
Deputy Secretary for Commerce and Economic
Development (Commerce & Industry)³

Mr YAU Kin-chung
Principal Assistant Secretary for Commerce and
Economic Development (Commerce and Industry)
Special Duties

Mr CHEUNG Sai-yan
Head of Trade Controls
Customs and Excise Department

Mr LAM Po-chuen
Head of Consumer Protection Bureau 2
Customs and Excise Department

Mr Gilbert MO Sik-keung
Acting Law Draftsman
Department of Justice

Mr Peter SZE Chun-fai
Government Counsel
Department of Justice

Clerk in attendance : Ms YUE Tin-po
Chief Council Secretary (1)3

Staff in attendance : Mr Bonny LOO
Assistant Legal Adviser 3

Mr Joey LO
Senior Council Secretary (1)3

Action

I. Meeting with the Administration

(LC Paper No. CB(1)1915/11-12(01) -- Administration's response to views submitted by organizations on the Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012

LC Paper No. CB(1)1824/11-12(03) -- Administration's paper in response to letter from Assistant Legal Adviser as set out in LC Paper No. CB(1)1321/11-12(03)

- LC Paper No. CB(1)1321/11-12(03) -- Letter from Assistant Legal Adviser to the Administration dated 15 March 2012
- LC Paper No. CB(3)511/11-12 -- The Bill
- File Ref: CITBCR 05/08/1 -- Legislative Council Brief issued by the Commerce and Economic Development Bureau
- LC Paper No. LS37/11-12 -- Legal Service Division Report
- LC Paper No. CB(1)1510/11-12(01) -- Latest marked-up version showing the proposed amendments to the Trade Descriptions Ordinance and the Telecommunications Ordinance prepared by the Administration)

The Bills Committee deliberated (Index of proceedings attached at **Appendix**).

2. The Bills Committee completed the scrutiny of the Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012.

Admin 3. The Administration was requested to:

- (a) consider amending the formulation of the proposed Schedule 3 with reference to the proposed Schedule 4, in order to achieve a more clearly defined coverage of "exempt person";
- (b) consider amending the heading of the proposed section 30S by replacing the abbreviation "CFI" with its long form "Court of First Instance" for clarity purpose; and
- (c) provide information on whether an exempt person listed in the proposed Schedule 3 (e.g. a registered dentist) would be exempt from an offence under section 7 of the Trade Descriptions Ordinance (Cap. 362), if that person supplied or offered to supply any goods (e.g. an electric toothbrush) to which a false

trade description was applied.

4. The Administration was requested to consult the Panel on Economic Development on the draft enforcement guidelines to be issued under the proposed sections 16BA and 16H after the passage of the Bill.

II. Any other business

5. The Chairman reminded members that the seventh meeting would be held on 29 May 2012 at 4:30 pm. The Bills Committee would follow up on the outstanding issues and consider the proposed Committee Stage amendments and the draft outline of the proposed enforcement guidelines to be submitted by the Administration.

6. There being no other business, the meeting ended at 4:25 pm.

Council Business Division 1
Legislative Council Secretariat
10 September 2012

**Proceedings of the sixth meeting of
Bills Committee on
Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012
on Monday, 21 May 2012, at 2:30 pm
in Conference Room 2A of the Legislative Council Complex**

Time marker	Speaker	Subject(s)	Action required
000000 - 000035	Chairman Administration	Opening remarks by the Chairman	
000036 - 000944	Chairman Administration	Briefing by the Administration on its response to views submitted by organizations on the Bill (LC Paper No. CB(1)1915/11-12(01)).	
000945 - 002607	Chairman Mr James TO Administration Assistant Legal Adviser (ALA)	<p>Discussion on the deputations' concern over the liability of various parties involved in a commercial practice.</p> <p>Mr James TO opined that although a defence was provided under section 26 of the Trade Description Ordinance (Cap. 362) (TDO) for the person charged if he/she could prove that the commission of the offence was due to mistake, an accident or some other cause beyond his or her control, etc., the displacement of the presumption of <i>mens rea</i> in certain proposed offences still required the person to exercise reasonable care and due diligence to avoid committing any of the proposed offences. The two legal requirements seemed incompatible. In this regard, Mr TO expressed concern about the heavy burden placed upon frontline salespersons to prove that they had exercised due diligence for something which were outside their control.</p> <p>ALA advised that under the existing section 26(1)(b) of TDO, the person was already required to take all reasonable precautions and exercise all due diligence to avoid the commission of such an offence.</p> <p>The Administration advised that given the defence provided under section 26, the salesperson would still have to adopt a common sense approach, by taking the responsibility to exercise reasonable care and due diligence, so as to avoid committing any of the proposed offences. The enforcement guidelines to be issued under the proposed sections 16BA and 16H would provide useful reference for the trades and the frontline staff.</p>	
002608 - 004413	Chairman Mr WONG Ting-kwong	Mr WONG Ting-kwong relayed the trades' concerns about whether an offence in respect of misrepresentation in advertisements would be committed if, for instance, a	

Time marker	Speaker	Subject(s)	Action required
	Administration Mr James TO	<p>computer retouched photograph was used in an advertisement on slimming or beauty service, and whether the contravention could be avoided if the advertisement was accompanied by a statement that the photograph had been retouched.</p> <p>The Administration advised that whether the offence false trade description or misleading omissions was committed would depend on all the facts and circumstances of the case, e.g. how concrete the claim in the advertisement was, whether the claim was misleading to a material extent, and whether any objective data which could be proven or disproved were provided in the advertisement. If the advertisement was accompanied by a clear statement that the photograph used had been retouched, the contravention might be avoided. The enforcement guidelines to be issued under the proposed sections 16BA and 16H would provide useful reference for the trades.</p> <p>Mr WONG Ting-kwong relayed the trades' concern that in the case of roadshow demonstration of a magnetic window cleaning device, whether it would constitute an offence of misleading omission if information on the thickness of the window to which the device was applicable was not provided to the consumers.</p> <p>The Administration advised that if the thickness of the window used for demonstration was lower than the windows commonly found in normal household, such information could be regarded as material information under the proposed section 13E, it was likely to constitute the offence of misleading omission.</p>	
004414 - 005528	Chairman Administration Mr James TO	<p>Clause-by-clause examination of the Bill (Chinese version)</p> <p><u>Latest marked-up version (LC Paper No. CB(1)1510/11-12(01))</u></p> <p><u>Clause 22 – Section 37 added (Amendment of Schedules 3 and 4)</u></p> <p>Members raised no query.</p> <p><u>Clause 23 – Schedule 3 added (Exempt Persons)</u></p> <p>In response to Mr James TO's enquiry, the Administration advised that there were no other categories of professionals who were regulated under their own statutory regulatory regimes besides the 24 categories of</p>	

Time marker	Speaker	Subject(s)	Action required
		professionals set out in the proposed Schedule 3.	
005529 - 005758	Chairman Administration ALA	<p><u>Clause 23 – Schedule 4 added (Excluded Products)</u></p> <p>Discussion on the legislative intent of the proposed repeal of section 7M of the Telecommunications Ordinance (Cap. 106) (TO).</p> <p>As the English text of the proposed Schedule 4 used "or" to connect "(Cap. 485)" and "the Securities and Futures Ordinance" (Cap. 571)", the Administration would propose a CSA to substitute “及” by “或” in the Chinese text correspondingly.</p>	
005759 - 010753	Chairman Mr James TO Administration ALA	<p>Discussion on whether an exempt person listed in the proposed Schedule 3 (e.g. a registered dentist) would be exempt from an offence under section 7 of TDO, if that person supplied or offered to supply any goods (e.g. an electric toothbrush) to which a false trade description was applied.</p> <p>Discussion on the need to amend the formulation of the proposed Schedule 3 with reference to the proposed Schedule 4, in order to achieve a more clearly defined coverage of "exempt person".</p>	The Administration to follow up as stated in paragraph 3(a) and (c) of the minutes.
010754 - 010900	Chairman Administration	<p><u>Clause 24 – Section 2 amended (definitions relevant to enforcement)</u></p> <p>Members raised no query.</p>	
010901 - 011230	Chairman Administration	<p><u>Clause 25 – Section 15 amended (power to enter premises and inspect and seize goods and documents)</u></p> <p>Members raised no query.</p> <p>The Administration would provide a response to ALA's question whether a person would be able to resist production of books and documents that were required to be kept under TDO and its subsidiary legislation on the grounds of legal professional privilege and/or the privilege against self-incrimination raised in his letter of 15 March 2012.</p> <p>The Administration would propose a CSA to explain the legal status and legislative effect of the notes used in the Bill.</p>	

Time marker	Speaker	Subject(s)	Action required
011231-011524	Chairman Administration ALA	<p><u>Clause 26 - Section 16BA added (Guidelines – general)</u></p> <p>In response to ALA's enquiry, the Administration advised that it aimed to consult the Bills Committee on the draft outline of the enforcement guidelines at the next meeting.</p> <p>At the Chairman's request, the Administration agreed to consult the Panel on Economic Development (the Panel) on the draft enforcement guidelines to be issued under the proposed sections 16BA and 16H after the passage of the Bill.</p>	<p>The Administration to follow up as stated in paragraph 4 of the minutes.</p>
011525 - 011600	Chairman Administration	<p><u>Clause 27 - Section 16E to 16I added (Section 16E - Enforcement relating to telecommunications and broadcasting)</u></p> <p>Members raised no query.</p> <p>The Administration would propose CSAs to replace all references to “Telecommunications Authority” and “Broadcasting Authority” with “Communications Authority” (CA) and to make other consequential amendments in the proposed sections 16E to 16H resulting from the establishment of CA.</p>	
011601 - 012030	Chairman Administration	<p><u>Clause 27 - Sections 16E to 16I added (Section 16F - Transfer of matters between enforcement bodies)</u></p> <p>Members raised no query.</p>	
012031 012130	Chairman Administration ALA	<p><u>Clause 27 - Sections 16E to 16I added (Section 16G - Memorandum of understanding)</u></p> <p>ALA enquired whether the relevant Panel(s) would be consulted on the draft memorandum of understanding (MOU) between the Customs and Excise Department and the CA.</p> <p>The Administration advised that the MOU was only an internal document setting out the division of responsibilities between the two parties. The signed MOU would be uploaded onto their respective websites once available.</p> <p>In response to the Chairman's enquiry, the Administration advised that the MOU was required to be prepared under the proposed section 16G. It did not constitute part of the amended TDO, nor would it be subsidiary legislation.</p>	

Time marker	Speaker	Subject(s)	Action required
012131 - 012328	Chairman Administration	<p><u>Clause 27 - Sections 16E to 16I added (Section 16H - Guidelines - telecommunications/broadcasting sector)</u></p> <p>Members raised no query.</p>	
012329 - 012509	Chairman Administration	<p><u>Clause 27 - Sections 16E to 16I added (Section 16I - Transitional provision)</u></p> <p>Members raised no query.</p>	
012510 - 012539	Chairman Administration	<p><u>Clause 28 - Section 19 amended (time limit for prosecutions)</u></p> <p>Members raised no query.</p>	
012540 - 012800	Chairman Administration	<p><u>Clause 29 - Part IIIB added - Enforcement (Undertakings and Injunctions) (Section 30L - Undertakings)</u></p> <p>Members raised no query.</p>	
012801 - 012850	Chairman Administration	<p><u>Clause 29 - Part IIIB added - Enforcement (Undertakings and Injunctions) (Section 30M - Effect of acceptance of undertaking)</u></p> <p>Members raised no query.</p>	
012851 - 013205	Chairman Administration ALA	<p><u>Clause 29 - Part IIIB added - Enforcement (Undertakings and Injunctions) (Section 30N - Withdrawal of acceptance of undertaking)</u></p> <p>In response to ALA's suggestion, the Administration would propose a CSA to amend the proposed section 30N(3)(b), so that upon withdrawal of acceptance of an undertaking, an authorized officer would be able to continue (as well as bring) proceedings in a court relating to the matter to which the undertaking related.</p>	
013206 - 013340	Chairman Administration	<p><u>Clause 29 - Part IIIB added - Enforcement (Undertakings and Injunctions) (Section 30O - Effect of withdrawal on time limit for prosecutions)</u></p> <p>Members raised no query.</p>	
013341 - 013630	Chairman Administration	<p><u>Clause 29 - Part IIIB added - Enforcement (Undertakings and Injunctions) (Section 30P - Injunctions)</u></p> <p>Members raised no query.</p>	

Time marker	Speaker	Subject(s)	Action required
013631 - 013600	Chairman Administration	<p><u>Clause 29 - Part IIIB added - Enforcement (Undertakings and Injunctions) (Section 30Q - Interim injunctions)</u></p> <p>Members raised no query.</p>	
013601- 013730	Chairman Administration	<p><u>Clause 29 - Part IIIB added - Enforcement (Undertakings and Injunctions) (Section 30R - Variation and discharge of injunctions)</u></p> <p>Members raised no query.</p>	
013731 - 014310	Chairman Administration ALA Ms Tanya CHAN	<p><u>Clause 29 - Part IIIB added - Enforcement (Undertakings and Injunctions) (Section 30S - CFI may exercise powers of District Court in certain cases)</u></p> <p>Discussion on Bills Committee's suggestion to amend the heading of the proposed section 30S by replacing the abbreviation "CFI" with its long form "Court of First Instance" for clarity purpose.</p>	The Administration to follow up as stated in paragraph 3(b) of the minutes.
014311 - 014806	Chairman Administration	<p><u>Clause 30 - Section 18A added (Power to award compensation)</u></p> <p><u>Clause 31 - Section 36 added (Actions for damages)</u></p> <p>Discussion on the power to award compensation and action for damages under proposed sections 18A and 36 respectively.</p> <p>The Administration would provide a response on the issue above, and to the question raised by ALA in his letter of 15 March 2012 on pre-empting any attempt by traders to evade the operation of TDO (including the proposed rights of private action under the proposed section 36) or to oust the jurisdiction of the Hong Kong courts by artificially inserting a choice of law clause in the contract to apply the law of a jurisdiction other than Hong Kong.</p>	
014807 - 014910	Chairman Administration	<p><u>Clause 32 - Long title amended</u></p> <p>Members raised no query.</p>	
014911 - 014919	Chairman Administration	<p><u>Clause 33 - Section 4 amended (marking and provision of information, etc. orders)</u></p> <p>Members raised no query.</p>	

Time marker	Speaker	Subject(s)	Action required
014920 - 014930	Chairman Administration	<p><u>Clause 34 - Section 6 amended (applying a trade description, trade mark or mark to goods)</u></p> <p>Members raised no query.</p>	
014931 - 015003	Chairman Administration	<p><u>Clause 35 - Section 11 repealed (false representations as to supply of goods)</u></p> <p>Members raised no query.</p>	
015004 - 015037	Chairman Administration	<p><u>Clause 36 - Schedule 2 repealed (goods specified for purposes of section 13B)</u></p> <p>Members raised no query.</p>	
015038- 015040	Chairman Administration	<p><u>Consequential amendments to the TO</u></p> <p><u>Clause 37 – Section 7M repealed (misleading or deceptive conduct)</u></p> <p>ALA explained that the proposed repeal of section 7M of the TO represented a policy change in that a business aggrieved by misleading or deceptive conduct in the telecommunications sector would be left without any remedy after section 7M of the TO had been repealed.</p> <p>The Administration advised that it was neither fair nor appropriate to subject traders from a single specific sector to additional prohibitions not applicable to other traders to which the Bill applied. All in all, it should not be a problem as the majority of the cases in relation to section 7M of the TO concerned aggrieved consumers.</p>	
015041 - 015044	Chairman Administration	<p><u>Clause 38 – Part VC heading amended (appeals relating to sections 7K, 7L, 7M, 7N and 7P)</u></p> <p>Members raised no query.</p>	
015045 - 015048	Chairman Administration	<p><u>Clause 39 – Section 32L amended (interpretation)</u></p> <p>Members raised no query.</p>	
015049 - 015051	Chairman Administration	<p><u>Clause 40 – Section 32N amended (appeals to Appeal Board)</u></p> <p>Members raised no query.</p>	

Time marker	Speaker	Subject(s)	Action required
015052 - 015055	Chairman Administration	<u>Clause 41 – Section 39A amended (remedies)</u> Members raised no query.	
015056 - 015330	Chairman Administration ALA	<u>Clause 42 - Section 43 added (Transitional provisions – Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012</u> Members raised no query.	
015331 - 015546	Chairman Administration	Meeting arrangement	

Council Business Division 1
Legislative Council Secretariat
10 September 2012